briefing note

Competition

Ten trends for 2014

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In 2014, two of the most noticeable changes to the competition law landscape will be the election of the new EU Competition Commissioner to replace Joaquín Almunia, and in the UK the entry into force of the Competition and Markets Authority ("CMA") to replace the Office of Fair Trading ("OFT") and the Competition Commission ("CC").

Alongside these changes, we expect to see a number of trends throughout 2014, such as the European Commission ("**Commission**") continuing to focus on increasing efficiencies in the enforcement of EU competition law, and the UK continuing its development towards a more investigative and intelligence led approach to cartel enforcement.

What will be the top ten trends for 2014?

1. Reform of the competition authorities and competition rules in the UK
2. An increase in EU merger notifications under the simplified procedure and a closing of the "enforcement gap" in relation to acquisitions of non-controlling minority stakes
3. No slowing down in the continued determination of the Commission and UK competition authorities to uncover and sanction cartel activity
4. An increased scrutiny of "most favoured nation" ("**MFN**") clauses in the online world and more generally, especially in the UK
5. A growing focus on the promotion of private damages and collective redress claims in the EU
6. A continued use of the formal commitment procedure in EU abuse of dominance cases
7. A closer monitoring of compliance by companies with commitment decisions at the EU level
8. A continued examination of pay-for-delay agreements in the pharmaceutical sector
9. A continued scrutiny of the maritime sector
10. An increase in merger activity in the air transport, rail and healthcare sectors

2014 therefore looks set to be an interesting year for competition law, although the extent to which the appointment of the new EU Competition Commissioner and the introduction of the CMA will result in any significant changes to the enforcement priorities of the EU and UK competition law regimes remain to be seen.

What is clear is the even more pressing need for companies to have effective compliance programmes in place.

If you have any questions relating to these trends or anything we have raised in this briefing note, please do not hesitate to contact either of us on the numbers below.

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1 Reform of the competition authorities and competition rules in the UK

In 2014, there will be significant developments in the UK competition regime with the implementation of the CMA and the UK Competition Network ("UKCN"), together with further changes under the Enterprise and Regulatory Reform Act 2013 ("ERRA").

The CMA was established on 1 October 2013 with the entry into force of parts of the ERRA, and will continue to operate in shadow form until 1 April 2014, at which point it will take over the competition and certain consumer functions of the OFT and the functions of the CC.

In addition to the establishment of the CMA, the ERRA also introduces some further key changes to the competition regime in the UK from 1 April 2014.

First, there will be a new test for the criminal cartel offence. The requirement on prosecutors to prove dishonesty in the offending conduct will be removed, and new defences and exemptions will be introduced. The aim is be to make the offence less difficult to prove, leading to more successful prosecutions and therefore maximising the deterrent effect of the offence.

Secondly, in merger cases, the CMA will have enhanced information-gathering powers, together with stronger powers to suspend and reverse integration between companies and to impose penalties for failure to comply with such interim measures. There will also be statutory timescales for all parts of the merger process, and also a time-limited period after the Phase 1 decision where merging parties can offer and negotiate undertakings in lieu of a referral to Phase 2.

Thirdly, for market investigations, there will be stricter time limits for all stages. Furthermore, the CMA will have stronger powers to gather information at Phase 1, and will be able to conduct cross-market inquiries into particular practices and to consider public interest issues alongside competition issues in reporting to the Secretary of State. Decisions at Phase 1 will be taken by the CMA Board and at Phase 2 by independent CMA Panel members.

In addition to the above changes, 2014 will also see the introduction of the UKCN, resulting in increased co-operation between the sectoral regulators and the CMA.

The ERRA includes amendments to the competition concurrency regime, under which sector regulators in certain regulated industries have "concurrent powers" to apply and enforce Chapters I and II of the Competition Act 1998 and Articles 101 and 102 of the Treaty on the Functioning of the European Union ("**TFEU**") (i.e. prohibitions on anti-competitive agreements and abuse of dominance). The ERRA expressly requires sectoral regulators to consider whether the use of their Competition Act 1998 powers is more appropriate before taking enforcement action under their sector-specific regulatory powers. The ERRA also introduces changes to require enhanced information sharing arrangements between the CMA and the sector regulators, to allow the CMA to decide who will act in a case in a concurrent sector, and to allow the CMA to take over a case from a concurrent regulator in certain circumstances.

According to the UKCN's Statement of Intent published by the CMA in December 2013, the UKCN will pursue its mission on the basis of six priority areas, namely: strategic dialogue, enforcement co-operation under competition law, enhancing capabilities, sharing best practice, advocacy, and the preparation of an annual concurrency report by the CMA.

The year ahead

It will be interesting to see how the CMA evolves. The fact that it has been in place since October 2013 should provide for continuity and a smooth transition come 1 April 2014. Nevertheless, we would be surprised if there were not some teething issues. More interesting perhaps will be whether the removal of the dishonesty requirement in the cartel offence will actually result in more successful prosecutions. We will also be curious to see how the somewhat novel defences work in practice and whether the CMA's guidance document on the cartel offence (due to be published in March 2014) will provide greater clarity and understanding as to how to apply the rules in this area.

The CMA published, on 10 January 2014, its first suite of guidance documents following several consultations during 2013. The final guidance documents published include: (i) mergers; (ii) market studies and investigations; (iii) administrative penalties; (iv) cost recovery in telecoms price control references; (v) transparency and disclosure; (vi) remedies; and (vii) transitional arrangements. The second suite of guidance documents is scheduled to be published in March 2014, and will include: (i) Competition Act 1998 – guidance on the CMA's investigation procedures; (ii) regulated industries – competition law in the regulated industries; (iii) cartel offence prosecution guidance; and (iv) proposed approach to the treatment of existing OFT and CC guidance.

2. An increase in EU merger notifications under the simplified procedure and a closing of the "enforcement gap" in relation to acquisitions of non-controlling minority stakes

2014 will see the implementation of some important changes in EU merger control, expanding the use of the simplified procedure and potentially making the acquisition of non-controlling minority shareholdings reviewable, resulting in the likely rise in merger notifications.

a) Expansion of the simplified procedure

On 1 January 2014, the Commission introduced measures to expand the use of the simplified procedure to horizontal mergers where the combined market shares of the parties are below 20% (an increase from the existing 15% threshold), and to vertical mergers where neither party has a share of 30% or more in any vertically related market (an increase from the current 25% threshold). The simplified procedure will also be available to horizontal mergers where the combined market shares of the parties are between 20-50%, and the merger only results in a small increment in market share (i.e. a delta of less than 150 in the Herfindahl–Hirschman Index ("**HHI**")), although the Commission reserves the right to review this on a case-by-case basis. Furthermore, the changes have introduced a "super-simplified" procedure for joint ventures that are active entirely outside the European Economic Area ("**EEA**") – notifying parties only need to describe the transaction, their business activities and provide the turnover figures that the Commission needs to establish jurisdiction.

Alongside this, the Commission has also introduced changes to the notification forms. For example, when submitting a Form CO, parties are only required to submit internal business reports that assess affected markets for the last two years, as opposed to three years under the previous rules. The Form CO and Short Form CO now also clearly identify categories of information that may be good candidates for waiver requests – notifying parties are encouraged to request these waivers.

For both the full and simplified procedure, the changes have introduced new wording that the notifying parties must take account of *"all plausible alternative relevant product and geographic markets"*. Although this wording is new, the Commission has stated that this reflects *"long-standing practice"*, and that the Commission is not changing this practice. The changes do, however, provide guidance as to how plausible product and geographic markets can be identified (i.e. Commission decisions and judgments of the EU Courts, or if no such precedents exist, then industry reports, market studies and/or internal business documents).

The changes have given notifying parties more discretion in deciding whether to engage in pre-notification discussions with the Commission. In very straightforward cases (i.e. where the merger does not give rise to any horizontal overlaps or vertical relationships), notifying parties can even skip pre-notification discussions altogether. Based on 2008-2010 figures, the Commission estimates that this will apply to around 25% of cases that qualify for the simplified procedure. However, in practice, notifying parties in straightforward cases may nevertheless prefer to engage in pre-notification discussions with the case team to confirm that all plausible product and geographic markets have been considered.

Some changes, however, could possibly increase the burden on notifying parties. For example, there is a new Section 5.3 in the Short Form CO, which requires the notifying parties in a transaction giving rise to one or more reportable markets under the simplified procedure to submit a range of internal documents, namely: *"copies of all presentations prepared by or for or received by any members of the board of management, or the board of directors, or the supervisory board, as applicable in the light of the corporate governance structure, or the other person(s) exercising similar functions (or to whom such functions have been delegated or entrusted), or the shareholders' meeting analysing the notified concentration"*. Such documentation was not previously required under the simplified procedure.

The Commission has also updated its model texts for divestiture commitments and for trustee mandates to bring them in line with the policy approach contained in the 2008 Notice on Remedies.

The aim of these changes is to streamline the merger analysis process for unproblematic cases, reduce the administrative burden for businesses and focus the Commission's resources on cases that require more thorough analysis. The Commission estimates that these changes will increase the proportion of mergers reviewed under the simplified regime by approximately 10% to between 60-70%.

The year ahead

Whether these changes to the merger notification procedure will actually reduce the burden on businesses remains to be seen. For example, it will be interesting to see the extent to which notifying parties opt not to engage in pre-notification discussions with the Commission in straightforward cases, and also the extent to which the Commission is willing to accept waiver requests.

Judging from previous experience, we expect that EU notifications – even in their more simplified manifestations – will remain a burden on businesses, involving both time and expense.

b) Review of acquisitions of non-controlling minority shareholdings

The Commission has also been considering expanding the scope of EU merger control to cover acquisitions of non-controlling minority shareholdings in its *"Towards more effective EU merger control"* consultation. This has become a topical issue over previous years after the Commission was publicly shown to be powerless to prevent Ryanair building a non-controlling 29.8% shareholding in rival Aer Lingus, launching repeated hostile takeover bids, and influencing Aer Lingus' management by holding the power to block special resolutions. Although the Commission was able to twice prohibit Ryanair's merger attempts, the Commission was powerless to make Ryanair divest or even reduce its shareholding, highlighting the gap in the Commission's merger review powers.

Under the current proposals, the acquisition of a non-controlling minority shareholding above 20% would be reviewable by the Commission. However, it is yet to be decided whether such acquisitions will require a mandatory notification or a voluntary notification on a self-assessment basis.

Acquisitions of minority shareholdings are currently reviewable under the UK regime in circumstances where a minority shareholder would be able to exert "material influence" over a target business as a result of the acquisition. Material influence is assumed to exist for shareholdings of 25% or more and may even extend to shareholdings of less than 15% where other circumstances exist which confer material influence over policy (e.g. special voting rights attached to the minority shares and/or supply arrangements or other contracts between the shareholder and the target).

Furthermore, in Germany, a notification is required for all acquisitions of at least 25% of shares (capital or voting rights) in a company, or when the shareholding allows the shareholder to directly or indirectly exercise a "competitively significant influence" over another company – this has allowed the German Federal Cartel Office ("**FCO**") to review acquisitions of minority shareholdings far below 25%.

The UK's scope to review acquisitions of minority shareholdings had been used in decisions requiring Ryanair and BSkyB to reduce minority shareholdings, allowing the UK, unlike the Commission, to intervene when competition concerns arose.

The year ahead

We expect the issue of EU jurisdiction over non-controlling minority interests to continue to be hotly contested in 2014.

Furthermore, although the number of merger notifications has fallen year on year since 2011, we expect 2014 to reverse the trend and report a small increase, especially if the planned rules on non-controlling minority shareholdings are introduced.

Looking beyond 2014, it will be interesting to see the effect the potential introduction of rules on non-controlling minority shareholdings at the EU level will have on the competition law regimes of other jurisdictions across the globe – many jurisdictions worldwide rely heavily on EU competition law (in particular, its concept of "control" in merger control) when drafting and interpreting their own competition law rules.

3. No slowing down in the continued determination of the Commission and UK competition authorities to uncover and sanction cartel activity

2013 was a busy year for the Commission not only in relation to cartel investigations, but also with regard to settlements and the application of the rules on parental liability and inability to pay. In the UK, 2013 was notable for the continued development of the OFT's intelligence led approach to cartel enforcement, and for cartel decisions imposing fines on small companies and cartels of short duration.

a) Continued determination by the Commission to uncover cartel activity

The Commission's steady enforcement activity against cartels continued during 2013 with four cartel decisions, imposing total fines of €1.883 billion. It was therefore a remarkably similar year to 2012, which saw a total of five cartel decisions with almost identical total fines of €1.876 billion. Furthermore, similar to its last minute €1.47 billion in fines in the Cathode ray tubes cartel investigation in December 2012, in 2013 the Commission again left it until the final moments to impose its largest fines, imposing €1.71 billion in fines in December 2013 for the Euro and Yen interest rate derivatives cases.

The Commission conducted four dawn raids during 2013 for possible cartel activities across a range of industries, including white sugar, cargo train transport services, oil and biofuels and consumer electronic products and small domestic appliances. This relatively low number (in comparison to 2012 (5) and 2011 (8)) may, however, be indicative of the large resource requirements that the latest investigations have necessitated given the complexities of the markets involved and the competition issues raised. For example, the dawn raids in the Oil and Biofuels investigation allegedly relate to concerns that companies may have colluded in reporting distorted prices to reporting agencies, such as Platts, to manipulate the published prices for a number of oil and biofuel products. These published prices are used as benchmarks for trade in the physical and

financial derivative markets for a number of commodity products in Europe and globally. Unsurprisingly, comparisons have already been made between this investigation and the LIBOR scandal, which this year in the EU alone resulted in record fines of €1.71 billion with more to follow. But it is too early to tell how the Oil Biofuels investigation will progress.

Meanwhile, the Commission's dawn raid practices continued to be subject to challenges, with both Orange and Nexans launching appeals in 2013 at the General Court and European Court of Justice ("**ECJ**") respectively. Nevertheless, the Commission will have taken comfort from the decision of the General Court in September 2013 dismissing an appeal by Deutsche Bahn and upholding the Commission's use of its dawn raid powers. Deutsche Bahn had claimed that the dawn raids conducted by the Commission at its offices in 2011 amounted to a *"fishing expedition"* and that the decision to conduct the dawn raids infringed its fundamental rights to inviolability of premises due to the lack of prior judicial authorisation, and also due to the lack of an effective legal remedy since there is no opportunity for prior judicial review of dawn raid decisions.

The Commission also issued revised procedural guidance on the conduct of dawn raid inspections, with a particular focus on its methods for identifying and capturing data in electronic form. Amongst other changes, the revised guidance now codifies the Commission's powers to search a variety of electronic devices, such as tablets and mobile phones, as well as specifying that it may install and use its own forensic IT tools on a company's IT hardware. For example, in its 9 July 2013 dawn raids in the Internet Connectivity investigation, the Commission seized and searched mobile phones belonging to the CEO's of Orange SA, Deutsche Telekom AG and Telefonica SA. Furthermore, in its 14 May 2013 dawn raids in the Oil and Biofuels investigation, the Commission searched cloud-data stored remotely by BP Plc, Royal Dutch Shell Plc and Statoil ASA.

Alongside dawn raids, leniency applications are a key method used by the Commission to uncover cartel activity. As part of its proposed Directive on private damages announced in 2013, the Commission has sought to protect the confidentiality of leniency applications as far as possible, especially corporate statements. This is a response to the ECJ's decisions in *Pfleiderer* and *Donau Chemie*, which have threatened the confidentiality of leniency documents in private damages actions by directing national courts to answer the question of disclosure of such documents on a case-by-case basis.

The Commission will also seek to continue to uncover cartels through co-operation with National Competition Authorities ("**NCAs**") and other competition authorities worldwide. The Commission currently has four co-operation agreements in the field of competition with each of the United States ("**US**"), Canada, Japan and Korea, and in 2013 concluded a fifth co-operation agreement with Switzerland, which is likely to come into force during 2014.

Alongside co-operation agreements, the Commission has also recently agreed Memorandums of Understanding in the field of competition law with China (2012) and India (2013). These agreements highlight the fact that co-operation with Member States of the Association of Southeast Asian Nations ("**ASEAN**"), in particular, is likely to be of growing importance in the fight against cartels in 2014 and beyond.

The year ahead

We expect that the Commission will continue to be active in cartel enforcement. We expect that there will be an even greater focus by the Commission and NCAs on data capture. We also expect to see more and closer co-operation globally. In particular, with all of the ASEAN Member States having committed to endeavour to introduce a national competition policy and law by 2015, and many of those with established competition policies and laws rapidly increasing their enforcement activities, we anticipate that co-operation with the ASEAN Member States is likely to be of increasing importance over the coming years.

b) Increased use by the Commission of the settlement procedure in cartel investigations

In 2013, the Commission concluded the seventh, eighth and ninth cartel investigations under the settlement procedure since its introduction in June 2008. Although nine settlement decisions in just over five years may not appear to be a significant milestone, one should consider that there have only been twenty-nine cartel decisions in total since the introduction of the settlement procedure, and that recent cartel decisions under the standard procedure have taken approximately five years to conclude.

Therefore, to already have nine settlement decisions after just over five years is notable. Especially so when in 2013 alone, three of the four cartel decisions were settlement decisions.

One of the key reasons why the Commission favours settlement decisions is the shorter timeframe involved in comparison to the standard procedure (with evidence from recent settlement decisions indicating that they take on average three years to conclude from immunity application to final decision, as opposed to five years under the standard procedure). This shorter timeframe results in procedural efficiencies for the Commission, reducing costs and freeing up resources to allow the Commission to undertake additional investigations. Furthermore, the settlement procedure has so far avoided subsequent appeals, which is a trend the Commission would like to continue.

It is noteworthy that where settlement talks do not, however, progress towards a quicker and more efficient outcome in a case, then the Commission will not hesitate to revert to the normal procedure, as evidenced in April 2013 when it abandoned settlement talks in the smart card chips cartel case due to a lack of progress.

One development which may hinder the proliferation of the settlement procedure is the anticipated introduction of the Directive on private damages. With a likely increase in private damages claims, parties to cartel proceedings may be less inclined to settle cases by acknowledging liability and thereby restricting any meaningful defence to such claims, albeit that a settlement decision is likely to be less detailed than a fully reasoned decision under the standard procedure and potentially therefore less damaging. Statements of Objections and Decisions in settlement cases have been on average between twenty to forty pages long, as opposed to several hundreds of pages under the standard procedure.

Two of the settlement decisions this year, the Euro and Yen interest rate derivatives cases, are notable for being only the second and third hybrid settlement decisions ever taken by the Commission, with the first being the Animal Feed Phosphates cartel settlement decision in 2010.

Furthermore, the Commission has set an interesting precedent in the Euro interest rate derivative decision by allowing a hybrid settlement decision with only four of the seven parties agreeing to settle. By contrast, in the Yen interest rate derivative decision only one of seven parties rejected a settlement, and in the Animal Feeds Phosphates decision only one of six parties rejected a settlement. Allowing a settlement decision with only four of seven parties agreeing to settle would seemingly minimise the efficiency gains under the settlement procedure, with the Commission having to run parallel settlement and standard procedure investigations.

It remains to be seen what the result would be at the EU level if in a hybrid settlement decision the Commission then failed to gather sufficient evidence to prove one or more of its allegations against a non-settling party. At the UK level, in 2010 the OFT in its Dairy Products investigation ended up reducing the early settlement agreement fines agreed with seven of the parties after concluding during its investigations against the non-settling parties (Tesco and Morrisons) that the evidence it had on file was insufficient to support an infringement finding with regard to some of its initial allegations. Furthermore, in late 2012 the Competition Appeal Tribunal on appeal overturned over half of the findings that the OFT had made against Tesco, with Tesco then agreeing in early 2013 to a reduced fine of £6.5 million, down from the original £10.43 million imposed by the OFT in 2011.

The year ahead

As a result of the Commission's stated desire to conclude more cartel investigations under the settlement procedure, and the increased use of the settlement procedure in cartel investigations over the past four years, we expect the settlement procedure to play an increasingly important role in future cartel investigations, with a higher percentage of cases being concluded with settlement decisions.

c) Increased focus on parental liability and inability to pay

The issue of parental liability is often hotly contested. It is likely to be of even greater concern to large corporations in 2014 following the ECJ's decision that parent companies can be liable for the activities of their 50/50 joint ventures. This expands upon the previous settled case law that parent companies can be liable for the activities of their wholly-owned subsidiaries.

Alongside the matter of parental liability, being part of a larger corporate group is also likely to be an issue for any companies seeking to make an inability to pay application under paragraph 35 of the 2006 Guidelines on Fines. In deciding an appeal in relation to the lifts and elevators cartel decision, the ECJ concluded that where fines are imposed on an undertaking which constitutes an economic unit and which is composed only formally of a number of legal persons, those persons' ability to pay cannot be taken into consideration individually.

On the topic of inability to pay applications, it was notable that in the North Sea shrimp traders cartel decision (the only cartel decision in 2013 not to conclude with a settlement decision) the Commission rejected the inability to pay application by the one party that applied.

There are also several appeals pending at the General Court in relation to the Commission's refusal to reduce fines further to inability to pay applications by parties to the 2010 Pre-Stressing Steel cartel decision. It is possible that these appeals may be decided in 2014, and if so, they may help develop the case law in this area.

In the meantime, the Commission and the French Competition Authority are currently co-chairing a working group at the European Competition Network, aimed at developing common rules on how the Commission and NCAs set fines against cartel members that are unable to pay.

The year ahead

We expect that companies will continue to challenge parental liability, and that there will be an increase in the number of applications regarding inability to pay fines. Parental liability is well established in case law and we do not expect this to

change, although no doubt it will continue to be contested. In addition, 2014 should provide some new developments on the rules relating to inability to pay.

d) UK is continuing to develop its intelligence led approach to UK cartel enforcement, and showing a willingness to fine small cartelists and short term cartels

In the field of UK cartel enforcement, there has been a continued trend in 2013 towards developing an intelligence led approach, by investing in the building of a dedicated intelligence function, developing a strong, expert investigator function, recruiting leading criminal prosecutors and taking an increasingly forensic approach to cartel investigations.

The OFT's view is that the combination of an effective leniency programme and a developed intelligence function is the best approach to uncovering cartels. One reason for this dual approach is the limitations of the leniency regime, in that it relies on companies choosing to come forward – experience suggests that leniency programmes more often than not catch late stage or failing cartels. Therefore, there has been significant investment in the training and recruitment of specialist staff to enable the OFT to uncover cartels through intelligence activities, and reduce its reliance on leniency programmes by developing its ability to take a more proactive approach to cartel detection. Since October 2009, almost half of the new cartel cases opened have been intelligence led, as opposed to being uncovered through leniency applications. Despite this early success, however, it will still take time before the benefits of this change in approach are fully realised.

Looking back at cartel enforcement in 2013, it is notable that there were no significant cartel fines imposed by the OFT in comparison to the large fines imposed by the Commission – with the fines totalling just over £2.8 million in the distribution of Mercedes-Benz commercial vehicles investigation constituting the largest fine imposed by the OFT.

2013 was, however, notable for the fines the OFT imposed against small companies and for short-term cartels.

For example, in the access control and alarm systems investigation, the OFT concluded on 6 December 2013 that the four companies under investigation had engaged in a number of collusive tendering arrangements affecting at least 65 tenders with a combined value of approximately £1.4 million. The OFT imposed total fines of £53,410 on three companies, with the fourth company receiving full immunity. In its decision, the OFT stated that this *"sends a clear message to businesses, however large or small, that we will pursue enforcement action where we believe competition law has been broken"*.

Furthermore, on 12 December 2013, the OFT announced a settlement with Hamsard 3149 Limited in relation to a market-sharing agreement with Lloyds Pharmacy Limited, whereby the parties agreed not to supply prescription medicines to each other's existing care home customers. Lloyds Pharmacy received full immunity under the OFT's leniency policy, and Hamsard 3149 Limited agreed to pay a fine of £387,856, despite the market-sharing agreement only operating between May and November 2011.

In the OFT's 5 August 2013 decision in the Mobility Scooters investigation, an infringement decision was issued for restrictions that only lasted from July 2011 to April 2012.

The year ahead

We expect the OFT/CMA to continue to invest in and develop its intelligence and investigative functions, and to continue to investigate and sanction cartel behaviour in the UK – regardless of the size of the companies and the duration of the cartel. We anticipate that the OFT/CMA will continue to pursue a balanced portfolio of cases, involving both large and small companies. Furthermore, we expect that the OFT/CMA will continue to enforce obvious price-fixing or bid rigging activity, regardless of the size of the market or the companies involved. Companies of all sizes should therefore continue to ensure that they have effective competition compliance programmes in place. We also expect the OFT/CMA to actively pursue more criminal prosecutions.

4. An increased scrutiny of MFN clauses in the online world and more generally, especially in the UK

With the use of MFN clauses having already been suspected of reducing competition in the online world in areas such as Amazon Marketplace, motor insurance and the sale of eBooks, we expect further investigations by the Commission and NCAs to assess where else MFN clauses may be being used to harm competition.

MFN clauses generally provide that a seller will reduce the price that it charges a buyer for a product or service to match a lower price that it offers to any other buyer during the term of the agreement.

Although MFN clauses can therefore be viewed as pro-competitive, they will however raise "red flags" to competition authorities when they are: (i) jointly adopted among competitors; (ii) negotiated into agreements by sellers with high market shares; (iii) accepted by buyers with significant buyer power; or (iv) used in agreements covering a significant portion of transactions in a given market. This is because in such situations they can act as a disincentive for sellers to offer

discounts, raise barriers to entry for new or smaller competitors, and/or facilitate co-ordination of prices amongst competitors without agreement – all of which can result in prices above the competitive level.

In short, competition issues arise with MFN clauses depending upon how they are used, and the strength of the parties using them.

The potential pro-competitive and anti-competitive effects of MFN clauses were recently considered by the CC in its motor insurance market investigation. In its provisional findings on the competitive effects of MFN clauses in conjunction with price comparison websites ("**PCW**"), the CC concluded that wide MFN clauses (i.e. those relating to all online sales channels) have an adverse effect on competition as they reduce entry, innovation and competition between PCWs. On the other hand, the CC concluded that narrow MFN clauses (i.e. those relating to prices only on the insurer's website), do not have an adverse effect on competition, and are in fact necessary for the survival of PCWs as they provide credibility to PCWs and prevent free-riding by motor insurance providers.

MFN clauses were also at issue in the OFT's hotel online booking case. There were concerns that the MFN clauses could reduce price competition between online travel agents and the hotel's own online platforms, as well as create barriers to entry for new or smaller online travel agents. In the OFT's Notice of intention to accept binding commitments, it stated that any current MFNs not in line with the commitments would need to be amended. The Notice also fired a warning shot at other industries, stating that it is *"open to the OFT to investigate MFN clauses in other industries should the OFT have reasonable grounds for suspecting that such clauses, in their specific industry context, infringe UK or EU competition law".* In December 2013, the OFT issued a follow-on Notice of intention to accept revised commitments, which expands the geographic scope of the commitments, and shortens their duration from three to two years.

Germany's FCO also undertook an investigation into the hotel online booking industry, and its investigation into HRS, a German hotel-booking service provider, was squarely focused on the use of MFN clauses. In its decision on 20 December 2013, the FCO concluded that HRS's use of its MFN clauses restricted competition and prevented market entry, and therefore ordered HRS to remove the MFN clauses from its contracts and terms and conditions as far as they affected Germany. The FCO is now investigating the use of MFN clauses by Booking.com and Expedia.

The OFT and FCO also conducted investigations into Amazon's use of MFN clauses in its Amazon Marketplace, under which sellers were obliged not to sell their products at lower prices on other platforms. Given that retailers using such online platforms pay the operators a percentage of the price of each product sold, there were concerns that MFN clauses in this instance could limit retailers from passing on an operator's lower fees in the form of a lower price for the consumer. Although Amazon initially announced in August 2013 that it would stop using such clauses, the OFT and FCO were still concerned that there was a risk that Amazon could return to using MFN clauses. Therefore, it was not until November 2013, after Amazon confirmed that it had removed the clauses and communicated the changes to its sellers, that both the OFT and FCO closed their investigations.

At the EU level, the Commission's investigation into eBooks, which also involved MFN clauses, finally closed in 2013 with the Commission accepting commitments from Penguin – the only company originally under investigation that did not settle with the Commission in 2012. Penguin's commitments are essentially the same as those accepted by the other companies in 2012, including the commitment not to enter into any agreement relating to the sale of e-books within the EEA that contains an MFN clause. According to the Commission, imposing this MFN commitment for longer than five years would not have been suitable in the fast-moving ebooks market, while less than five years would have been insufficient to address the competition concerns identified.

The year ahead

In light of the recent investigations into the use of MFN clauses, a senior DG Comp official recently suggested that if MFN clauses continue to be found to be harmful to competition, then perhaps they should be subject to an object-based analysis and added to the hard-core list of vertical agreements.

Although such legislative change in relation to MFN clauses is likely to be far off, in the immediate future we can expect increased scrutiny of MFN clauses in the online world by the Commission and NCAs.

5. A growing focus on the promotion of private damages and collective redress claims in the EU

With Joaquín Almunia aiming to implement legislation to encourage private damages actions in the EU before the end of his term as EU Competition Commissioner in May 2014, and the UK in consultations over the draft Consumer Rights Bill, private damages are certain to be a key topic in 2014.

It is widely considered that private damages actions are a key part of an effective competition regime due to their compensatory function and their deterrent effect. However, the

Commission estimates that victims of EU cartels are foregoing €13-37 billion in compensation, as out of a total of 54 cartel prohibition decisions by the Commission from 2006-2012, only 15 were followed by one or more follow-on damages actions. Furthermore, almost all of these resulting 52 follow-on damages actions were brought by large companies and predominantly in three Member States (Germany, Netherlands and the UK).

In June 2013, the Commission published a legislative package, including a Directive on private damages, aimed at allowing victims of antitrust infringements to effectively exercise their rights to full compensation. The Directive is still under negotiation, but the key policy proposals are aimed at:

- ensuring that final decisions of NCAs and review courts constitute full proof before civil courts that an infringement occurred;
- providing clear limitation periods for bringing claims;
- imposing joint and several liability;
- allowing use of the pass-on defence;
- providing a rebuttable presumption that an infringement caused harm; and
- clarifying the rules regarding disclosure of evidence.

Clarifying the rules regarding disclosure of evidence is the most significant policy proposal in the Directive. Following the ECJ decisions in *Pfleiderer* and *Donau Chemie*, and decisions of national courts in the UK and Germany, the Commission is concerned that the possibility of leniency and settlement files being disclosed to private damages claimants may deter potential immunity applicants from coming forward in future. Therefore, it has taken the opportunity to clarify the situation through legislation. Current proposals are for, at the very least, a ban on the disclosure of leniency statements and settlement submissions.

Another key part of the legislative package is the Recommendation on collective redress, encouraging Member States to set up collective redress mechanisms. In particular, the Recommendation seeks to prevent US-style class actions from taking place by limiting the types of entity able to bring a collective action, encouraging opt-in models as opposed to opt-out models, avoiding contingency-fee structures and prohibiting punitive damages.

Despite concerns that such proposals could result in a US-style class action culture in the EU, it is notable that collective actions are already available in about half of the Member States and that in the UK the introduction of an opt-in collective redress mechanism has only resulted in one class action to date, in which the costs exceeded the award.

The UK has now sought to introduce a more effective collective redress mechanism in its draft Consumer Rights Bill. There are some key differences between the Recommendation and the draft Consumer Rights Bill, with the draft Consumer Rights Bill introducing a regime for both opt-out proceedings and opt-out settlements, for both standalone and follow-on claims. Furthermore, the draft Consumer Rights Bill also grants standing to all directly affected claimants, whether individuals or businesses, albeit that law firms, third party funders and special purpose vehicles are precluded from bringing collective actions.

Similar to the Recommendation, however, the draft Consumer Rights Bill includes safeguards to avoid US-style class actions, including a certification process, a ban on contingency fee structures in opt-out claims, and a prohibition on exemplary damages.

The year ahead

The EU legislation is currently under review by two European Parliament committees (Economic and Monetary Affairs Committee, Legal Affairs Committee) with their votes due at the end of January 2014. The European Council, on the other hand, has already agreed to a *"general approach"*, with the aim of adopting the legislation before May 2014. It is likely that any further negotiations will be over the proposals concerning disclosure of evidence, the binding effect of national decisions and the limits on the exposure of whistle-blowers, as these have been the most contentious provisions to date.

Given that when adopted Member States will have two years to implement the proposals, the Directive is not expected to have an immediate impact on private damages actions in the EU, and therefore the UK, Netherlands and Germany will likely continue to be the main jurisdictions for private damages claims in the meantime. The collective redress elements of the draft Consumer Rights Bill, however, could in theory come into force as early as 2014, although there is currently no set implementation timetable.

6. A continued use of the formal commitment procedure in EU abuse of dominance cases

Since Joaquín Almunia took up the post of EU Competition Commissioner in February 2010, ten abuse of dominance investigations have concluded with commitment decisions, whereas only one has concluded with a prohibition decision. Provided the new EU Competition Commissioner follows this pattern, this suggests that in 2014 and beyond, commitment decisions are likely to be the Commission's preferred choice when resolving abuse of dominance cases.

There are several likely reasons behind this shift away from prohibition decisions, such as administrative efficiencies (there is

no need for the Commission to prove a theory of harm or issue a Statement of Objections), and the shorter timeframe in which abuse of dominance investigations can be concluded, resulting in a quicker resolution of the competition concerns on the market. Because of the quicker resolutions that commitment decisions can offer they can be well suited to dynamic markets, such as technology markets, where they can be used to restore competition to the benefit of consumers quicker than prohibition decisions, which sometimes take several years to conclude (by which time the market may have evolved significantly). Commitment decisions are still, however, considered by some to be too slow to remedy competition concerns in dynamic markets due to the sometimes significant amount of time required to successfully negotiate and then implement the commitments.

A current example of a commitment decision being proposed in a dynamic market is the on-going investigation into Google's online search functions. Although the Commission has considered and rejected two sets of commitments offered by Google, the Commission has been keen to conclude this case via commitments as it is considered that this would have an almost immediate impact on the market, with – according to the Commission – Google revising its business practices in line with the commitments to the benefit of consumers. If, however, the Commission proceeds with a prohibition decision, which is looking increasingly likely, it could be years before a decision is made. If Google do offer a third set of commitments then an unprecedented third market test could be possible – although the Commission would be unlikely to mandate a third market test unless satisfied that the new commitments are satisfactory.

The Commission is also currently considering commitments offered by Samsung in relation to an investigation into its enforcement of the standard essential patents it owns in the field of mobile communications.

Additionally, commitment decisions are well suited to abuse of dominance investigations in certain regulated industry sectors, such as the energy sector. This is because they can help address competition issues arising during the liberalisation process much more swiftly and in a more targeted way than prohibition decisions.

For example, in April 2013, the Commission accepted structural commitments from Czech electricity incumbent CEZ to divest generation assets in the Czech Republic to allow a new entrant to enter the market. This was in response to concerns that CEZ was abusing its market position by reserving capacity in the transmission network in order to prevent competitors from entering the market. In December 2013, the Commission also accepted behavioural commitments from Deutsche Bahn regarding its pricing system for traction current in Germany with the aim of resolving margin squeeze concerns in the German markets for rail freight and long-distance passenger transport. Furthermore, Russia's Gazprom is currently in discussions with the Commission after submitting a draft proposal aimed at remedying concerns that it has been impeding the flow of natural gas to Central and Eastern Europe, restricting the diversification of gas supplies, and illegally linking gas prices to oil prices.

The year ahead

The two investigations likely to attract the most attention in early 2014 will be the Google and Gazprom investigations. Joaquín Almunia has already stated that time is running out for both Google and Gazprom to submit acceptable commitment proposals, and that if they fail to do so then the Commission will proceed under the standard procedure and issue Statements of Objections to both companies.

2014 may also see increased commentary relating to concerns that the Commission's preference towards commitment decisions is having a detrimental effect on deterrence.

For example, there are concerns that the willingness of the Commission to accept commitments has nullified the deterrent effect of its fining powers, which have rarely been used in abuse of dominance investigations of late.

Furthermore, there are concerns that the equally important deterrent effect from private damages actions is impeded. When investigations are concluded with commitments, there is no infringement decision for victims to rely upon in follow-on private damages actions. This has also raised concerns over the ever increasing lack of up to date jurisprudence, which could result in the Commission and NCAs having to rely on outdated case law.

Given these concerns, and the Commission's clear preference for using commitment decisions in future abuse of dominance cases, the Commission may be inclined to announce in the near future plans for the introduction of a more comprehensive legal framework, or the commissioning of a comprehensive review (similar to the Merger Remedies Study which provided a comprehensive review of the commitments accepted by the Commission in previous merger cases) aimed at explaining the Commission's commitment decisions to date and codifying its practices.

7. A closer monitoring of compliance by companies with commitment decisions at the EU level

The increasing reliance on commitment decisions as the Commission's preferred choice to resolve abuse of dominance cases means that it is increasingly important that the commitments are effectively enforced.

This issue was highlighted by the €561 million fine against Microsoft in March 2013 for failure to comply with its commitments to offer users a choice screen for internet browsers when installing its Windows operating software.

This fine is approximately 1.02% of Microsoft's global turnover, and although this percentage may appear low, it is in fact an above average fine both in terms of the percentage and in absolute terms.

This above average fine is despite the fact that Microsoft only breached one of its three commitments, that the breach was only temporary, and that Microsoft immediately admitted its mistake and remedied the situation. The Commission seemingly took no consideration of whether the other two commitments that were in place could have been sufficient to address the competition concerns during the breach of the browser choice screen commitment.

Although the Commission could have fined Microsoft under Article 24(1)(c) Regulation 1/2003, which provides for periodic penalty payments not exceeding 5% of the average daily turnover of the preceding business year per day to compel parties to comply with commitments, the Commission instead fined Microsoft under Article 23(2)(c) Regulation 1/2003, which provides for a fine of up to 10% of total turnover in the preceding business year. Given the limited duration of the breach, the periodic penalty provision (which would have resulted in a lower fine) could have been more appropriate. Furthermore, it is notable that the Commission rejected Microsoft's offer to extend the choice screen commitment by a further 15 months.

The Commission's decision to impose a high fine on Microsoft under Article 23(2)(c) Regulation 1/2003, rather than simply promote compliance in this particular case by imposing a periodic penalty fine and accepting an extension of the browser choice commitment, therefore suggests that its intention was to establish a strong deterrent effect in order to discourage other companies from breaching commitments in the future – thereby improving the effectiveness of commitment decisions.

The Commission has also been seeking to ensure the effectiveness of commitment decisions by insisting upon the appointment of an approved independent monitoring trustee as part of its commitment decisions. Monitoring trustees are a useful tool for the Commission in ensuring continued compliance with commitments – provided that the Commission and the company involved can find and agree upon a monitoring trustee that is genuinely independent, which can be difficult for large multinationals. Recently, the appointment of an approved independent monitoring trustee has been included in the 2012 Thomson Reuters and Rio Tinto Alcan commitment decisions, and also in the 2013 CEZ and Deutsche Bahn commitment decisions. Furthermore, Google also agreed to appoint an approved independent monitoring trustee as part of its second commitments offer, prior to the commitments being rejected by the Commission.

The year ahead

We expect that the appointment of an approved independent monitoring trustee will increasingly be included in future commitment decisions, especially in relation to complex behavioural remedies. However, given that Microsoft's breach of its commitments was clearly in the public domain and yet still took a significant amount of time to be discovered, the appointment of an approved independent monitoring trustee may also become prevalent in more straightforward commitment decisions.

8. A continued examination of pay-for-delay agreements in the pharmaceutical sector

Four years after the publication of its Pharmaceutical Sector Inquiry Report, in 2013 the Commission issued its first two decisions relating to pay-for-delay agreements in the pharmaceutical sector.

The Citalopram and Fentanyl decisions have set some important precedents which are likely to have an impact on the examination of pay-for-delay agreements in the EU over the coming years.

First, the decisions have confirmed that pay-for-delay agreements concluded in the context of a patent dispute (Citalopram), or unrelated to a patent dispute (Fentanyl), can infringe competition law.

Secondly, the decisions have confirmed that pay-for-delay agreements are infringements of competition law "by object", thereby relieving the Commission of the burden of proving a negative effect on competition.

This is an interesting contrast to the recent clarification of US case law by the US Supreme Court in the Activis case, in which it rejected a "per se" illegal approach adopted by the Third Circuit, and ruled that pay-for-delay agreements should be assessed under a "rule of reason" approach. The US Supreme

Court therefore squarely placed the burden on the US Federal Trade Commission ("**FTC**") to show that pay-for-delay agreements have a negative effect on competition. Given that the Activis and Citalopram decisions were announced within days of each other, it is surprising that they have adopted such different approaches in this regard.

The parties in the Citalopram case have already launched five appeals to the General Court, with their grounds of appeal all suggesting that the Commission erred by holding that pay-for-delay agreements were an infringement "by object". Although it will likely be two or three years before the General Court reaches its decisions, it will be interesting to see if it follows the US approach by overruling the Commission's "by object" approach and instead placing the burden on the Commission to show an effect on competition in such cases.

By adopting an infringement "by object" approach the Commission has dispensed with the need to review the strength of the patents which form the basis of the settlement agreements. The appeals by the Citalopram parties also claim that the Commission erred by not adopting a "scope of the patent" approach (i.e. whereby agreements do not infringe competition law if the terms of the agreement were within the exclusionary scope of the patent, and the patent itself was legitimate), as was previously the standard in the US before the Activis decision.

In rejecting the requirement to assess the strength of the underlying patents, the Commission has perhaps made it difficult for pharmaceutical companies to protect their products in genuine patent disputes without having to dispute the patents all the way to trial. This is a particular problem in the EU. Unlike the US with its highly regulated system under the Hatch-Waxman Act, the EU has a fragmented system in which pharmaceutical companies can face multiple challenges to their patents across several Member States. Although the implementation of a unified patent system and a unified patent court has been agreed, it is unlikely to solve the issue in the short term. Because of this fragmented system, there is a strong incentive for pharmaceutical companies to settle patent disputes due to the significant cost and time savings that settlements offer. Indeed, in its 4th Report on the Monitoring of Patent Settlements, published on 9 December 2013, the Commission found that the number of patent settlements had increased during 2012 from previous years. Furthermore, the number of settlements with a value transfer was 12, which is a similar figure to 2011 (13) and higher than 2010 (3) and 2008/09 (9).

With the number of patent settlements in the pharmaceutical sector increasing, and the proportion of those settlements involving a value transfer remaining around the 10% mark, the Commission is likely to continue its close monitoring of the sector and sanctioning of any agreements that it believes have artificially delayed the entry of generic versions of medicines onto the internal market to the detriment of consumers. The precedents set by the Citalopram and Fentanyl decisions have put the Commission in a strong position to resolve its two outstanding pay-for-delay investigations into Modafinil and Perindopril, and decisions could therefore come as early as 2014. Indeed, on 19 December 2013 the Commission sent out a letter of facts to the companies involved in the Perindopril investigation, setting out additional details, which perhaps suggests that the Commission is looking to progress this case soon.

Meanwhile, the OFT has estimated that it is likely to issue its first decision in relation to pay-for-delay agreements in October 2014. This investigation is in relation to pay-for-delay agreements for Seroxat between GlaxoSmithKline and three generic producers.

Furthermore, in early January 2014, Italy's highest appeal court for competition confirmed the imposition of a €10.7 million fine on Pfizer for delaying generic versions of its eye glaucoma medicine Xalatan from entering the market. Although the final judgment has not been published, the decision is reported to be based on an abuse of dominance, whereby Pfizer excluded legitimate competitors through complicated regulatory procedures to illegitimately extend its patent, together with threatening competitors with litigation.

In France, meanwhile, on 19 December 2013 the French Competition Authority issued its final report following an investigation into the pharmaceutical industry, which stressed the importance of promoting generic medicines, and condemned the practice in France of originator companies attempting to prevent generic entry by running defamatory campaigns against such companies and their generic versions of medicines. In 2013, the French Competition Authority sanctioned two originator companies for such practices in relation to Plavix and Subutex. In the Subutex investigation, the originator company was also sanctioned for offering pharmacies rebates as yet another method of preventing market entry by the generic companies.

The year ahead

We expect that these issues will continue to be debated, and anticipate more decisions by the Commission in 2014. Hopefully, any new Commission decisions will provide greater clarity on the assessment of pay-for-delay agreements, given the present unsatisfactory position of the conflict between the US and EU approaches which makes it difficult for global companies to know how they can legitimately protect their pharmaceutical products.

2014 will also see the introduction of the new Technology Transfer Block Exemption ("**TTBE**") to replace the current version which expires on 30 April 2014. The latest draft of the proposed

TTBE Guidelines includes a specific section on settlement agreements explaining that they can be problematic if they lead to delayed or limited market entry and that particular scrutiny is necessary if the licensor provides an inducement, financially or otherwise, for a licensee to accept more restrictive settlement terms than would otherwise have been accepted based on the merits of the licensor's technology. Unfortunately, the current drafting has been criticised for not providing enough detail or guidance to clarify when pay-for-delay agreements will or will not breach the competition rules. It will be interesting to see if the TTBE Guidelines ultimately provide any useful guidance for pharmaceutical companies going forward in 2014.

9. A continued scrutiny of the maritime sector

Cartels and restrictive business practices are likely to be key themes in the maritime sector during the course of 2014, as 2013 ended with the Commission opening a formal investigation into container liner shipping companies, and entering into formal discussions with the newly established P3 alliance.

The Commission has been monitoring the maritime sector for potential antitrust abuses ever since the repeal of Regulation 4056/86, which while in effect from July 1987 to October 2008 contained a block exemption from Article 101 TFEU for container liner shipping companies which were members of liner conferences, specifically permitting price fixing and capacity co-ordination in appropriate circumstances. The Commission adopted Guidelines in 2008 to facilitate the transition from a specific to a general competition regime, but allowed these to lapse in September 2013 as part of its policy of phasing out sector-specific antitrust rules.

The Commission's concerns regarding the maritime sector were evident from its two investigations in 2010 and 2012 into lay-up schemes in relation to feeder vessels. The Commission had concerns that the schemes had the aim of reducing the available capacity of feeder vessels in the EU, and increasing the rates of chartering feeder vessels. Both investigations were closed after the parties agreed to abandon their schemes.

Between these two cases, in May 2011 the Commission conducted dawn raids at the offices of several container liner shipping companies, suspecting violations of the antitrust rules that prohibit cartels and restrictive business practices and abuses of dominant market positions. Following a two-year investigation, on 22 November 2013 the Commission opened formal antitrust proceedings for a suspected concerted practice in breach of Article 101 TFEU. The investigation is based on evidence which suggests a practice of price signalling, whereby the companies under investigation (reported to be 14 in total) have been making, in parallel, regular public announcements of price increase intentions through press releases on their websites and in the specialised trade press.

This was shortly followed by Russia's Federal Antimonopoly Service ("**FAS**") also opening a cartel investigation against 14 container shipping companies on 28 November 2013 following dawn raids earlier in the year.

Concerns over co-ordination of price increases have also arisen in relation to a proposed "P3 alliance" between Maersk Line, MSC, and CMA CGM, the world's three largest shipping companies, to co-operate on three major trade routes, namely: Europe-Asia, trans-Pacific and trans-Atlantic. It is reported that the P3 alliance would allow the companies to control 42% of shipping on routes from Asia to Europe, 24% on trans-Pacific routes and 40-42% on trans-Atlantic routes. Although the P3 alliance plans to set up a joint vessel operation centre to manage deployment of the ships, there are concerns that the P3 alliance will be a forum for collusion, and that commercial information will be shared between the companies leading to price co-ordination. Furthermore, there are concerns that plans to jointly negotiate contracts with terminals will result in the P3 alliance only using terminals owned by their own subsidiaries. It has been reported that the P3 alliance will require merger approvals in Germany and Poland.

The P3 alliance notified its plans to the US Federal Maritime Commission in October, which then stopped the clock on its investigation whilst it requested further information and hosted formal talks with the P3 alliance in conjunction with the Commission and the Chinese Ministry of Commerce.

The year ahead

2014 looks set to be an interesting year in the maritime sector with formal proceedings into container liner shipping companies by both EU and Russian competition authorities, and the scrutiny of the P3 alliance by US, EU and Chinese competition authorities.

10. An increase in merger activity in the air transport, rail and healthcare sectors

The air transport, rail and healthcare sectors are all likely to see merger activity in 2014, with the rail and healthcare sectors in particular likely to see a marked increase in mergers.

a) Air transport

With a total of four airline merger decisions, 2013 saw the Commission examine its nineteenth merger/alliance in the air transport sector since 2004.

In two of these mergers there was an element of déjà vu, as both Ryanair and Aegean Airlines returned to the Commission in the hope that it would approve their new bids to acquire Aer Lingus and Olympic Air respectively.

For Ryanair, however, it was a second prohibition decision from the Commission. This was due to evidence suggesting that since the previous prohibition decision in 2007 the combined market positions of Ryanair and Aer Lingus had strengthened from 80% in 2007 to 87% in 2012 for short-haul flights out of London, and the number of routes in direct competition between Ryanair and Aer Lingus had increased from 35 in 2007 to 46 in 2012 with the proposed merger creating an outright monopoly on 28 of these routes. Ryanair's merger aspirations were further impeded when the CC issued its final report, requiring Ryanair to reduce its 29.8% shareholding in Aer Lingus down to 5%.

For Aegean Airlines, on the other hand, the on-going Greek crisis and Olympic Air's concurrent financial difficulties allowed the successful use of the "failing firm" defence. The Commission concluded that if that transaction did not proceed then the most likely scenario was that Olympic Air's assets would leave the market, leaving Aegean Airlines as the only significant domestic service provider. Therefore, given that Aegean Airlines would inevitably capture Olympic Air's market share in any event, the Commission granted merger clearance.

The rescue of an airline from financial difficulties was also at issue in US Airway's proposed acquisition of American Airlines. In the EU, despite the Commission's record of three prohibition decisions in the air transport sector since 2007, and suggestions that the merger would create the largest airline in the world, the Commission cleared the merger subject to commitments. The commitments were aimed at addressing competition concerns on the London-Philadelphia route, and included releasing one daily slot pair at London Heathrow and Philadelphia and providing incentives for a new entrant airline, such as special feed tariff agreements.

Shortly following the Commission's decision the US Department of Justice instead decided to file a lawsuit blocking the merger, despite American Airlines having been in bankruptcy since November 2011. Nevertheless, following intense lobbying in favour of the proposed merger from government officials, airline creditors and businesses, the US Department of Justice reached a settlement to clear the merger subject to the divestment of 104 slots at Reagan, 34 slots at LaGuardia and further slots in Chicago, Boston, Dallas, Miami and Los Angeles, together with the necessary facilities to operate them.

The more comprehensive conditions imposed by the US Department of Justice reflect the fact that there were significantly more competition concerns arising from overlapping routes in the US in comparison with the EU. Both decisions, however, had the same aim of assisting an alternative airline to operate on the routes where competition concerns would otherwise arise.

2013 also saw the Commission accept legally binding commitments from Star Alliance members Air Canada, United Airlines and Lufthansa to address concerns that their co-operation under a revenue sharing joint venture may be in breach of EU competition law and harm premium passengers on the Frankfurt-New York route. The parties agreed to make landing and take-off slots available at airports in Frankfurt and/or New York to facilitate the entry of competitors onto the Frankfurt-New York route.

In early 2014, the Swiss Competition Authority fined 11 airlines for their involvement in an airfreight cartel (composed of, amongst others, British Airways, Air France-KLM and United Airlines) after finding that the airlines had concluded illegal agreements on various elements relating to pricing for air freight. This follows on from the fines imposed by the Commission in the air cargo carriers price fixing cartel decision in November 2010.

The year ahead

With an average of two airline merger notifications a year, and with Ryanair having already appealed both the CC's decision to the Competition Appeal Tribunal and the Commission's prohibition decision to the General Court, the air transport sector is likely to continue to attract headlines during the course of 2014, although there is unlikely to be further large-scale consolidation.

b) Rail

2014 is likely to see increased merger activity in the rail sector as the UK government implements its long term plans for rail franchising.

Following the recommendations in the Brown review of the rail franchising programme, the UK Government has been busy negotiating a series of contractual extensions and direct awards

with current franchise operators. These are designed to provide a more sustainable schedule for rail franchising by staggering the start dates of the new long term franchises and delivering fewer franchise competitions each year.

The year ahead

Under the current rail franchising timetable, five long term UK rail franchises are due to be awarded during the course of 2014, each of which may require merger clearance.

c) Healthcare

2014 is also likely to see increased merger activity in the UK healthcare sector, together with a more significant role for Monitor, the sector regulator for health services established in 2012 under the Health and Social Care Act 2012.

On 1 April 2013, Monitor's concurrent competition powers in relation to the provision of healthcare services in England came into force, and in a joint statement released on 17 October 2013 by Monitor, the OFT and the CC, it was confirmed that Monitor's expertise as the health sector regulator will play an important role in the overall assessment of future NHS hospital mergers.

The joint statement also highlighted the clinical and financial difficulties facing some NHS hospitals, and predicted that NHS hospitals may seek to merge to address these difficulties.

One recent example was the proposed merger between Royal Bournemouth and Christchurch Hospitals NHS Foundation Trust and Poole Hospital NHS Foundation Trust, which both provide a range of healthcare services in Dorset. This merger was motivated by financial difficulties faced by Poole Hospital, and the aim of improving economies of scale, realising synergies and giving both parties greater financial stability. Following a referral from the OFT, the CC decided to prohibit the merger.

2013 also saw the OFT review its first pathology joint venture, in this case between University College London Hospitals NHS Foundation Trust, Royal Free London Foundation Trust and The Doctors Laboratory Limited. The OFT cleared the merger on 11 November 2013 after finding that the deal would not substantially lessen competition. Furthermore, on 21 January 2014, Monitor announced that it will review a proposed merger between the pathology services of Brighton & Sussex University Hospitals NHS Trust and Surrey & Sussex Healthcare NHS Trust – although the OFT has jurisdiction to investigate mergers between NHS foundation trusts and between NHS foundation trusts and other businesses, Monitor is responsible for reviewing mergers between two or more NHS trusts.

Following the CC's investigation into private healthcare, on 16 January 2014 the CC recommended as part of its draft remedies that BMI Healthcare should sell seven hospitals in London, the Home Counties and North West England, while HCA Hospitals should sell two central London hospitals.

The year ahead

Further consolidation in the healthcare sector is likely in 2014, and we can expect Monitor to play an increasingly important role, as the OFT and the CC rely on its increasing experience and expertise. The increasing involvement by Monitor will most likely be welcomed by healthcare groups, as there has been criticism in the past that the process for NHS hospital mergers takes too long, costs too much, and often reaches the wrong conclusion – with the abovementioned Dorset case being criticised for reaching the wrong conclusions by prioritising competition concerns over other important factors that influence quality, such as regulatory frameworks and contractual commitments.

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